DOCKET FILE COPY ORIGINAL

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

JUN 23 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	

OPPOSITION AND COMMENTS OF CABLE AND WIRELESS USA, INC.

Rachel J. Rothstein
Paul W. Kenefick
Johnathan Session
8219 Leesburg Pike
Vienna, VA 22182
703-905-5785

June 23, 1999

SUMMARY

Cable & Wireless USA, Inc. ("C&W USA") hereby files this opposition and comments to petitions for reconsideration filed in the Commission's docket addressing slamming. In this filing, C&W USA opposes those petitions that request the Commission reconsider its decision to prohibit executing carriers from re-verifying preferred carrier changes received from a submitting carrier. The Commission's reasoning for enacting this prohibition is sound and should not be disturbed. C&W USA also opposes requests for the Commission to set time limits for the validity of a verified letter of agency. The time limits proposed are not acceptable and could be used for anticompetitive purposes by an executing carrier.

C&W USA files in support of the majority of petitioners that request the Commission reconsider its slamming liability rules. These rules, both the 30 day absolution rule and the carrier-to-carrier compensation rule, are administratively unworkable, would result in widespread fraud, and are inconsistent with Section 258(b) of the Communications Act. Moreover, these rules place an unjustified administrative burden on those carriers not engaged in slamming through the investigation, adjudication, and re-billing mandates.

C&W USA also files in support of those petitions requesting the Commission preempt state verification rules. Preemption of these verification rules is consistent with the Communications Act since it will not affect state enforcement of the FCC's rules.

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996	)	
	)	CC Docket No. 94-129
Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers	)	

OPPOSITION AND COMMENTS OF CABLE AND WIRELESS USA, INC.

Pursuant to the Federal Communications Commission's ("Commission") Public Notice[1] and Section 1.429(f) of the Commission's rules,[2] Cable & Wireless USA, Inc. ("C&W USA") hereby files this Opposition and Comments to the Petitions for Clarification and/or Reconsideration filed in the Commission's Second Report and Order and Further Notice of Proposed Rulemaking ("Second R&O and Further Notice") in this docket prescribing rules to control and provide remedies for "slamming," the unauthorized changes in end user's selections of a telephone exchange or telephone toll services provider.[3]

[1] Federal Communications Commission, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2332, 64 Fed. Reg. 30520 (June 8, 1999).
[2] 47 CFR §1.429(f).
[3] Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, CC Docket No. 94-129, Second Report and Order and Further Notice of Proposed Rulemaking, FCC 98-334, released December 23, 1998 ("Second R&O and Further Notice"). A summary of the Second R&O and Further Notice was published in the Federal Register on February 16, 1999. See 64 Fed. Reg. 7746, as modified 64 Fed. Reg. 9219 (February 16, 1999).

C&W USA opposes those petitioners requesting the Commission reconsider its prohibition on executing carriers re-verifying carrier selection changes that have been submitted to them for execution.[4] C&W USA supports, however, those petitioners requesting the Commission reconsider its anti-slamming absolution and carrier-to-carrier adjudication and compensation procedures. As illustrated in Part II of these Comments, the Commission's absolution rules and carrier-to-carrier compensation rules violate Section 258 of the Communications Act,[5] will result in widespread fraud, and will be administratively impossible to implement.

I. THE COMMISSION SHOULD NOT AMEND ITS RULES PROHIBITING EXECUTING CARRIERS FROM RE-VERIFYING CARRIER SELECTION CHANGES.

In the Second R&O and Further Notice, the Commission concluded that executing carriers should not re-verify carrier changes prior to executing the preferred carrier change.[6] The Commission agreed with those commenters that stated an executing carrier could use verification as an opportunity to delay or deny carrier changes in order to gain a competitive advantage for itself or for affiliated carriers.[7] In addition, the Commission found that re-verification by the executing carrier would violate the Commission's Customer Proprietary Network Information ("CPNI") rules since the executing carrier would be using the carrier change information for purposes other than which it was submitted.[8] Further, such a re-verification would serve as a de facto preferred carrier freeze, forcing the subscriber to confirm the authorization provided to the submitting

[4] Second R&O and Further Notice at ¶99.
[5] 47 USC §258 (1991).
[6] Second R&O and Further Notice at ¶97.
[7] Second R&O and Further Notice at ¶99.
[8] Id.

carrier.[9] C&W USA agrees with the Commission's reasoning on this matter and urges it to reject these arguments for reconsideration.

In their petitions for reconsideration, the coalition of small, rural local exchange carriers ("Rural LECs") and the National Telephone Cooperative Association ("NTCA") both argue the Commission should abandon its rule prohibiting executing carriers from re-verifying preferred carrier changes from submitting carriers.[10] The Rural LECs argue this rule should be reconsidered and amended since the local exchange carriers have a long term, close relationship with the subscribers and would be in the best position to prevent unauthorized carrier selection changes.[11] Further, since the executing LECs must commit time and energy to solving slamming problems, they should be allowed to play a role in their prevention.[12] NTCA made similar arguments and questioned the Commission's reliance on the CPNI statute as a basis for this prohibition. Specifically, NTCA contends that an executing carrier's re-verification of the subscriber change order would not be a violation of the CPNI statute since the executing carrier would not use this information for marketing purposes,[13] and if the executing carrier does not re-verify then it could be held liable for an unauthorized preferred carrier change under common law agency and state tort law.[14]

Each of these arguments is without merit and should be rejected by the Commission. First, the argument that the LEC has a close relationship with the subscriber is not a valid reason to amend this rule; in fact, this would further validate the

---

[9] Second R&O and Further Notice at ¶100.
[10] See Rural LECs at 1-10, NTCA at 6-11.
[11] Rural LECs 2-3.
[12] Rural LECs at 10.
[13] NTCA at 10.
[14] NTCA at 8.

Commission's decision. The market power of LECs and their relationship with the subscriber places them in a position to use their role as executing carrier in an anticompetitive manner. The executing carrier could use re-verification as a means to delay or, in the case of a executing carrier with an IXC affiliate or strategic relationship, win-back the subscriber to the executing carrier's preferred carrier.

Second, the argument that the executing carrier expends time and resources to participate in the administrative process once the unauthorized change is discovered completely disregards the fact that executing carriers collect preferred carrier change fees and PIC dispute charges. As a carrier with both a direct sales operation and one that provides resale services to several interexchange carriers, C&W USA operates as a submitting carrier and as an executing carrier when one reseller changes to another. The "time and expense" incurred by executing carriers, particularly LECs, is fully compensated through the PIC fee charged and the PIC dispute charges, which can be as much as $50 per dispute.

Third, NTCA's argument that re-verification somehow comports with the narrow exception envisioned by Section 222(b) is a fundamental misreading of the statute.[15] The LEC re-verification process is not an integral aspect of executing changes in a customer's preferred carrier, rather re-verification goes beyond the intended purpose of the proprietary information transfer. To interpret 222(b) in such an over-broad manner could result in executing carriers re-verifying the calling plans chosen by the subscriber, or, in the case of an executing carrier being the billing agent of the submitting carrier, re-verifying each charge billed on behalf of the submitting carrier. The Commission's

[15] NTCA at 10.

interpretation of the CPNI statute for these purposes is correct and should not be amended.

Fourth, NTCA's argument that common law agency and state tort law would hold the executing LEC liable for an unauthorized carrier change submitted by a carrier as the subscriber's agent disregards the legal preeminence of a federal statute. Unauthorized carrier changes are regulated by statute, thus common law agency principles are superceded. If an executing LEC is accused of violating a state tort or agency law due to the agent's authorization not being re-verified, then the executing LEC can use the Communications Act and the Commission's rules as a complete defense.

II. THE COMMISSION SHOULD RECONSIDER AND REVISE ITS SLAMMING LIABILITY RULES.

C&W USA agrees with those petitioners who request the Commission reconsider and revise its slamming liability rules and files comments in support of these petitions. If implemented,[16] the slamming liability rules enacted in the Second R&O and Further Notice would be an administrative nightmare, resulting in wide spread fraud and increased costs to consumers. The Commission's slamming liability rules, which require absolution for the first 30 days of charges if the consumer has not paid and a transfer of funds to the authorized carrier if the consumer has paid for the unauthorized service, are in conflict with Section 258 of the Act and make broad, erroneous assumptions as to how a carrier's billing, collection, and accounting operations work.

[16] The Commission's slamming liability rules have been stayed by the U.S. Court of Appeals for the D.C. Circuit. MCI WorldCom, Inc. v. Federal Communications Commission, No. 99-1125 (D.C. Cir., May 18, 1999).

A. THE 30 DAY ABSOLUTION RULE VIOLATES THE ACT.

The Commission should reconsider and eliminate the policy that permits consumers to refuse to pay any charges imposed by the slamming carrier for 30 days after the unauthorized change has occurred.[17] Likewise, C&W USA opposes those petitions that request the Commission expand the 30 day absolution to 30 days from the receipt of the bill,[18] to 60 days,[19] or indefinitely.[20] Several petitioners requested the Commission reconsider this rule since it violates both the clear intent and letter of Section 258(b) of the Communications Act.

In their Petitions for Reconsideration, Frontier, AT&T, and Sprint all stated that the Commission's 30 day absolution policy violates Section 258(b) of the Act.[21] Section 258(b) clearly and unambiguously states a carrier that slams shall be liable to the previously selected carrier in an amount equal to all charges paid by such subscriber after the violation. The Commission's power to change such a clear statutory mandate is nonexistent.[22] When Congress has spoken on a matter, the Commission, as any other federal agency, may not follow a different path. The Commission does not have the discretion to substitute its policy judgments for that of the Congress.[23] Further, by mandating absolution, this rule violates Section 258(b) by depriving the previously

---

[17] Second R&O and Further Notice at ¶41-42.
[18] NCTA at 8.
[19] NYSCP at 5.
[20] NASCUA at 8.
[21] See Frontier at 3-8, AT&T at 2-5, Sprint at 7.
[22] Frontier at 5; AT&T at 5.
[23] Frontier at 4.

selected carrier from funds that it otherwise would have received but for the absolution policy.[24]

C&W USA agrees with the statutory interpretation of these petitioners and requests the Commission reconsider and amend its rule. Section 258(b) clearly states any telecommunications carrier that is in violation of 258(a) and that collects charges shall be liable to the previously selected carrier for the amount collected. The intent of this statute is for the slamming carrier to remit charges actually collected by the authorized carrier. The Commission cannot rely on its general rulemaking authority in the Communications Act or the savings clause in Section 258 to subvert the intent of this statute by mandating slamming carriers provide consumers with an absolution option. The absolution option provides the consumer with a disincentive to pay for services provided by the unauthorized carrier, directly undermining the ability of the unauthorized carrier to collect these charges, thus hampering its ability to forward funds to the previously selected carrier as mandated in Section 258(b).

B. THE 30 DAY ABSOLUTION POLICY IS POOR PUBLIC POLICY

C&W USA supports the petitions requesting reconsideration and repeal of the 30 day absolution policy for public policy reasons.[25] The 30 day absolution option provides consumers with a disincentive to make payments for services rendered, can be exercised based on a mere allegation of slamming, and, most importantly, will result in wide spread fraud. The incentive to receive 30 days of free service will result in an increased number of consumers making repeated, unsubstantiated claims of slamming because there is a

[24] Sprint at 7.
[25] GTE at 2; AT&T at 3, 12; Sprint at 3-6; Frontier at 9.

built in incentive to do so. In many instances, these claims will not be pursued or rebutted by the accused carrier simply due to the administrative complexity and costs associated with such an effort. Claims of slamming will increase exponentially, with carrier uncollectable costs increasing proportionately. These costs, as with all uncollectables, will eventually be passed onto consumers through higher rates.

In the Second R&O and Further Notice, the Commission failed to establish adequate legal justification to mandate carriers remove charges on phone bills based on unproven allegations by subscribers.[26] Equity and statutory authority demand that the Commission's liability rules be structured to take effect after a violation has been proven, not when an allegation has been made. Upon further review, C&W USA believes the Commission will recognize that the overwhelmingly complex and inequitable slamming rules must be amended and, at a minimum, cannot be triggered by a mere unsubstantiated allegation.

C. THE ADMINISTRATIVE BURDEN PLACED ON THE AUTHORIZED CARRIER IS OVERWHELMING AND UNJUSTIFIED.

C&W USA supports those Petitions for Reconsideration that request the Commission repeal its rules placing adjudicative and rebilling mandates on the authorized carrier. In the Second R&O and Further Notice, the Commission mandated that upon learning of a slamming allegation, the authorized carrier shall demand the unauthorized carrier submit proof of verification, analyze this verification for its validity, rule on the validity, and, if it determines the other carrier had proper verification, bill on behalf of the other carrier.[27]

---

[26] Sprint at 9.

[27] See Second R&O and Further Notice at ¶41-46.

Most parties petitioning for reconsideration recognized the duties placed on the authorized carrier are problematic.[28] Petitioners recognized the system as established by the Second R&O and Further Notice creates an administrative nightmare for the parties involved, particularly the authorized carrier. The authorized carrier will clearly have a conflict of interest since it will have a disincentive to rule in favor of its competitor, and it will not want to make a determination that adversely affects its relationship with its customer.[29] Since these slamming accusations will most likely be validated due to the perverse incentives involved, slamming will actually increase,[30] countering the goals established by the Commission in the Order.[31] The system established in the Order fails to provide any usable standards or criteria that could mitigate the incentives for authorized carriers to rule against the unauthorized carrier.[32]

C&W USA agrees with these petitioners that the carrier-to-carrier system established in the Second R&O and Further Notice creates perverse incentives and insurmountable administrative problems. This system actually punishes carriers that abide by the Commission's rules and do not engage in slamming. Even though C&W USA has a very low rate of slamming when compared to similarly situated carriers in the interexchange market, under this rule its compliance costs will increase substantially. Certainly, the Commission's rules should make every effort to reward, not punish, those carriers that have not engaged in slamming. Instead, under the Commission's existing rules it is precisely those carriers that are saddled with most of the burden, which necessarily requires a substantial allocation of resources and capital.

---

[28] See Frontier at 18, RCN 3-4, Excel 3-5, Media One at 7, GTE at 4, AT&T at 6-9, Sprint at 10-13.
[29] RCN at 4, Excel at 4, AT&T at 7, Sprint at 11.
[30] Sprint at 12.
[31] Second R&O and Further Notice at ¶4.

Perhaps the most disconcerting issue is that the Commission's rules seemingly ignore or disregard the realities of the telecommunications industry's operations. The most glaring example is the Commission's mandate that one competing carrier re-bill on behalf of another if it determines proper verification has been proven.[33] Billing systems are not set up to handle this task, and the Commission did not provide any accounting or business rules to determine how this would be accomplished. For example, what accounting standard should a carrier use when billing on behalf of a competitor, and how should carriers settle their accounts? Carriers will have a further disincentive to make claims under this system since it requires the sharing of proprietary information with a competitor. Fewer carriers will seek to have competing carriers rebill on their behalf, providing a an additional incentive for fraudulent slamming claims, resulting in increased slamming complaints, and, once again, defeating the intended purpose of the Second R&O and Further Notice.

III. C&W USA SUPPORTS PETITIONS REQUESTING THE COMMISSION PREEMPT STATE VERIFICATION LAW.

In their Petitions, RCN and Excel petition the Commission to reconsider and preempt state regulation of verification procedures for carrier change requests.[34] Preemption is necessary due to the differing and conflicting requirements that exist in the states. Preemption of state procedures would be consistent with Section 258 since it would have no impact on state enforcement actions.[35]

---

[32] AT&T 7.
[33] SBC at 3.
[34] RCN at 9, Excel at 9.
[35] RCN at 9.

C&W USA supports these petitions for preemption of state regulation of verification procedures. The Commission's rules are complex and require a substantial dedication of resources. If the individual states are permitted to devise additional and perhaps conflicting obligations, the compliance costs associated with anti-slamming rules will increase dramatically. Potentially, carriers would be unable to comply with any of the rules because of their limited resources.

IV. THE COMMISSION SHOULD REJECT REQUESTS FOR TIME LIMITS ON LETTERS OF AGENCY.

In its petition for reconsideration, SBC requests the Commission institute a time limit on LOAs submitted to executing carriers.[36] SBC suggests a 30 day time limit for the validity of an LOA since the subscriber may have already made a subsequent carrier change or does not remember this authorization, thus inadvertently changing carriers and making slamming allegations.[37]

C&W USA opposes this request in SBC's petition for reconsideration and requests the Commission reject LOA time limits on the record. SBC's basis for setting a 30 day time limit is not justified since it does not account for preferred carrier change rejects issued by the executing carrier where the subscriber had placed a preferred carrier freeze on his/her line but failed to have it lifted prior to the carrier change selection. In such a situation, if a submitting carrier has to contact the consumer again and explain why the verified change request cannot be executed and have the consumer directly contact the executing carrier, then a 30 day time limit would be inadequate. Further, LOA time limits can be used by executing carriers for anticompetitive purposes. An

[36] SBC at 11.
[37] SBC at 13.

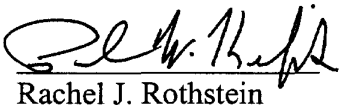
executing carrier, for example, that wants to delay or prevent the carrier change can raise several invalid reasons with the submitting carrier in order to delay the request until the time limit has been reached, rendering the otherwise acceptable LOA invalid.

V. CONCLUSION

C&W USA respectfully submits this Opposition and Comments in this docket. C&W USA commends the Commission for addressing and attempting to alleviate the problem of slamming. Although well intentioned, however, the Commission's slamming liability rules adopted in the Second R&O and Further Notice should be changed in order to create a more workable and equitable system that operates within the boundaries of Section 258.

Respectfully Submitted,

CABLE & WIRELESS USA, INC.

By: 

Rachel J. Rothstein
Paul W. Kenefick
Jonathan Session
8219 Leesburg Pike
Vienna, VA 22182
703-905-5785

June 23, 1999

Chairman William E. Kennard
Federal Communications Commission
The Portals
445 12th Street, SW, 8th Fl.
Washington, DC 20554

Commissioner Harold Furchgott-Roth
Federal Communications Commission
The Portals
445 12th Street, SW, 8th Fl.
Washington, DC 20554

Commissioner Michael K. Powell
Federal Communications Commission
The Portals
445 12th Street, SW, 8th Fl.
Washington, DC 20554

Commissioner Susan P. Ness
Federal Communications Commission
The Portals
445 12th Street, SW, 8th Fl.
Washington, DC 20554

Commissioner Gloria Tristani
Federal Communications Commission
The Portals
445 12th Street, SW, 8th Fl.
Washington, DC 20554

Anita Cheng
Common Carrier Bureau
Federal Communication Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Dorothy Attwood
Federal Communication Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Glenn Reynolds
Acting Chief, Enforcement Division
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

ITS
1231 20th Street, NW
Washington, DC 20037

Gary L. Phillips
Counsel for Ameritech
1401 H Street, NW, #1020
Washington, DC 20005

Mark C. Rosenblum
Peter H. Jacoby
Attorneys for AT&T Corp.
295 North Maple Avenue
Room 3250J1
Basking Ridge, NJ 07920

James G. Pachulski
Stephen E. Bozzo
Bell Atlantic Telephone Companies
1320 North Court House Road
Eight Floor
Arlington, VA 22201

M. Robert Sutherland
Richard M. Sbaratta
Rebecca M. Lough
BellSouth Corporation
1155 Peachtree Street, N.E., Suite 1700
Atlanta, GA 30309-3610

Danny E. Adams
Steven Augustino
Rebekah J. Kinnett
Kelley Drye & Warren LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036

Carol Anne Bischoff
Robert McDowell
The Competitive Telecommunications Assn.
1900 M Street, NW
Suite 800
Washington, DC 20036

Marcy Greene
Michael Donahue
Pamela Arluk
Swidler & Berlin, Chartered
3000 K Street, NW, Suite 300
Washington, DC 20007

Cynthia B. Miller
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Michael J. Shortley, III
Attorney for Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Andre J. Lachance
Gail L. Polivy
GTE Service Corporation
1850 M Street, NW
Suite 1200
Washington, DC 20036

Gary L. Mann
IXC Long Distance, Inc.
98 San Jancinto Boulevard
Suite 700
Austin, TX 78701

Douglas W. Kinkoph
LCI International Telecom Corp.
8180 Greensboro Drive, #800
McLean, VA 22102

Mary L. Brown, Esq.
MCI WorldCom, Inc.
1801 Pennsylvania Ave., NW
Washington, DC 20006

Lawrence G. Malone
New York State Dept. of Public Service
Three Empire State Plaza
Albany, NY 12223-1350

Leon M. Kestenbaum
Jay C. Keithley
Michael C. Fingerhut
Counsel for Sprint Corporation
1850 M Street, NW, 11th Floor
Washington, DC 20036

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW, Suite 701
Washington, DC 20006

Mary McDermott,
Linda Kent
Keith Townsend
U.S. Telephone Association
1401 H Street, NW, Suite 600
Washington, DC 20005

John Windhausen
President
ALTS
888 17th Street, NW
Washington, DC 20006

Brad Ramsey
NARUC
1100 Pennsylvania Avenue, NW, Suite 603
P.O. Box 684
Washington, DC 20044

Anne F. Curtin
Intervenor Attorney
New York State Consumer Protection Board
5 Empire State Plaza
Suite 2201
Albany, NY 12223

David C. Bergman
Ohio Consumers Counsel
77 South High Street
15th Floor
Columbus, OH 43266

Susan M. Eid
Vice President, Federal Relations
MediaOne Group, Inc.
1919 Pennsylvania Ave., NW
Washington, DC 20006

Barbara R. Hunt
SBC Communications, Inc.
One Bell Plaza
Room 3026
Dallas, TX 75202

David Cosson
Kraskin, Lesse & Cosson, LLP
2120 L Street, NW
Suite 520
Washington, DC 20037

L. Marie Gillroy
National Telephone Cooperative Association
2626 Pennsylvania Ave., NW
Washington, DC 20037